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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

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No. 983

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Battle Mountain Company, Petitioner,

v.

Stewart L. Udall, Secretary of the Interior

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Battle Mountain Company, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The Court below reversed the decision of the United States District Court for the district of Oregon. The District Court reversed the decision of the Secretary of the Interior on judicial review of his administrative action.

## OPINIONS BELOW

The 1967 opinion of the Court of Appeals for the Ninth Circuit (Appendix A, infra, pp. A1-A13) is unreported, except in the slip opinion, Stewart L. Udall v. Battle Mountain Company No. 21,259, October 18, 1967.

The 1966 opinion of the United States District Court for the District of Oregon (Appendix B, infra, pp. A14-A28) is reported at 255 F. Supp. 382.

The 1963 opinion for the United States Department of the Interior, Office of the Secretary (Appendix C, infra, pp. A28-A32) is unreported.1/

The 1961 opinion of the United States Department of the Interior, Director, Bureau of Land Management (Appendix D, infra, pp. A33-A35) is unpublished.2/

The 1918 opinion of the Department of the Interior is unpublished. This opinion validated the right here under consideration and held that "the base is valid for the purpose of new selection by virtue of the contract with the Secretary of the Interior, the validity of which was recognized by the saving clause of the act of March 3, 1905 (33 Stat. 1264)".3/ C.R. 79.4/

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1/ Unpublished copy may be obtained from United States Department of the Interior, Office of the Solicitor, A-29146, January 31, 1963, as per statement in index digest published by the Solicitor.

2/ Unpublished copy may be obtained from United States Department of the Interior, Director, Bureau of Land Management, Office of the Solicitor, Oregon 011230, July 28, 1961.

## JURISDICTION

This Court may wish to correct the departure of the court below from the authoritative pronouncements of this Court which established settled rules of property affecting title to lands of the United States and its citizens. The particulars of such departure and reasons for granting certiorari are set forth under Argument.

The judgment of the United States Court of Appeals for the Ninth Circuit to be reviewed was dated and entered October 18, 1967. Rehearing was denied November 28, 1967. An order entered December 8, 1967, fixed January 3, 1968, as the time within which to file a petition for certiorari. Mandate was stayed until final disposition of this case by the Supreme Court of the United States.

Title 28 U.S.C. 1254 (1) as revised by the Act of June 25, 1948, Chapter 646 (62 Stat. 928) is believed to confer on the Supreme Court of the United States jurisdiction, in its discretion, to review this case by writ of certiorari.

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CONTINUED 3/ Unpublished copy may be obtained from United States Department of the Interior, Director, Bureau of Land Management, Office of the Solicitor, W. H. Oliver, Attorney in fact for Santa Fe Pacific Railroad Company, decision of June 15, 1918.

4/ The record in this case is unprinted. The letters C.R. are followed by numbers to pages in the transcript of the record before the United States Court of Appeals for the Ninth Circuit filed herein.

## QUESTIONS PRESENTED

1. Whether the Secretary of the Interior had authority in his discretion to extinguish Battle Mountain's rights to select 160 acres of lieu land for 160 acres of base land conveyed to the United States by Santa Fe Pacific Railroad Company, from whom Battle Mountain purchased the rights, by reason of the Director's unauthorized 1956 deed of the base land to Santa Fe, issued with knowledge that Santa Fe had sold its rights, when Battle Mountain duly recorded its rights under the Recordation Act of 1955, (69 Stat. 534), where the rights were based on contract with the United States ratified by the Act of 1905, (33 Stat. 1264), and were based upon a decision of the Secretary's predecessor in office which determined that the base lands were valid for a new selection of 160 acres from the public domain.

2. Whether legal and equitable title to the base lands remains vested in the United States since the Director's 1956 deed of the base lands to Santa Fe was unauthorized and void.

3. Whether Battle Mountain's rights to select 160 acres of lands from the public domain are floating rights,the same as a scrip right, freely assignable.

## CONSTITUTION AND STATUTES

1. The Fifth Amendment to the Constitution of the United States providing due process, notice and hearing, and protecting property against taking without compensation is sufficiently familiar to the Court as not to require quotation.

2. Federal Statutes applicable to this case

are set forth in pertinent part in Appendix E hereto:

Act of June 4, 1897, (30 Stat. 36) A35
Act of March 3, 1905, (33 Stat. 1264) A36
Act of September 22, 1922, (42 Stat. 1017) A37
Act of April 28, 1930, Sec. 6, (46 Stat. 257) A38
Act of August 5, 1955, (69 Stat. 534) A39
Act of July 6, 1960, (74 Stat. 334, 335) A40
Act of August 31, 1964, (78 Stat. 751) A41

## STATEMENT OF THE CASE

Battle Mountain purchased through mesne conveyances obligations of the United States, which were distributed to the public by Santa Fe Pacific Railroad Company. C.R. 2. Subsequent legislation has made these obligations payable at the election of the owner either in land or in money. Act of August 31, 1964, (78 Stat. 751) set out in Appendix E, p. A41.

These obligations exist by virtue of a contract made by former Secretary Hitchcock with the Santa Fe Pacific Railroad Company and others under which the United States acquired land needed for public purposes.5/ The contract was subsequently ratified by Congress.6/

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5/ The report made by Secretary Hitchcock to the House of Representatives in 1906, House Document 613, 59th Congress, 1st Session, Cong. Doc. Ser. No. 4989, states the reasons for the formation of the consolidated San Francisco Mountains Forest

In part performance of the contract, the Santa Fe Pacific Railroad Company conveyed to the United States on November 24, 1908, 160 acres of base land7/ in consideration of the obligation of the United States to honor the right to select in lieu thereof an equal quantity of vacant, surveyed, non-mineral, public land open to homestead entry. C.R. 114.

The United States took possession of the base lands acquired under the contract and incorporated them with the San Francisco Mountains Forest Reserves into a consolidated forest reservation which also served the public purpose of protecting the watershed of the Salt River Valley. House Document 613, p. 14, Appendix F, p. A54; House Document 613, pP. 92-93 (not reproduced)

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5/continued. Reserve, and sets forth the correspondence embodying the contract with the Santa Fe Pacific Railroad Company and others. Portions are reproduced in Appendix F, pp. A43-A58.

6/ Act of March 3, 1905,(33 Stat. 1264), is set out in Appendix E, p. A36. As the Secretary's instructions sent to local land officers May 16, 1905, stated, in providing that "the validity of contracts entered into by the Secretary of the Interior prior to the passage of this act shall not be impaired", Congress referred to, recognized and authorized the consummation of this agreement. Accordingly, the land officers were instructed to continue to accept relinquishments of base lands made under this contract by the Santa Fe Company. 33 L.D. 558, 559.

7/ Base lands conveyed were the South half of the Northwest quarter and the North Half of the Southeast quarter of Section 35, Township 19 North, Range 5 East of the Gila and Salt River Base and Meridian, Arizona.

The Government's acceptance of title to the 160 acres of base land which was the consideration for the selection rights here involved is evidenced by a departmental decision of June 15, 1918, which stated: "The base is valid for the purpose of a new selection by virtue of the contracts entered into by the Santa Fe Pacific Railroad Company with the Secretary of the Interior, the validity of which was recognized by the saving clause of the Act of March 3, 1905, (33 Stat. 1264)." C.R. 79.

Santa Fe received payment for this base land when it sold and assigned the selection rights and issued irrevocable powers of attorney, coupled with an interest, to select and to convey in its name the lieu land to be received from the United States.8/

In 1955, Congress recognized that many land selection rights, including lieu selection rights assertable under the act of March 3, 1905, had been transferred by inheritance, assignment or operation of law and were outstanding in the hands of unknown owners. The Recordation Act of August

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8/ The practice of "scripping" various kinds of selection rights by the sale of such powers of attorney was judicially recognized in Begue v. Grizzly Livestock & Land Co., 1 F. Supp. 229. In 1897 Act cases, where there was no contract with the Government and the relinquisher retained equitable title to the base land pending completion of an exchange with the Government, the sale of such powers of attorney carried with it all the rights of the vendor in and to the "base" land as well as in and to the "lieu" land after it was selected. Downer v. Grizzly Livestock & Land Co., 43 P 2d 843, 846.

5, 1955, (69 Stat. 534), Appendix E, p. A39, established a time limit within which such unknown owners must establish privity with the Government by recording their rights with the Bureau of Land Management. Battle Mountain duly recorded its ownership of the lieu selection rights here in question in 1957 while the invitation to unknown owners remained open. C.R. 2, 115, 116.

The Secretary's motions to dismiss plaintiff's complaint and in the alternative for summary judgment conceded for the purposes of the litigation the following facts: (1) that Battle Mountain was the real party in interest; (2) that Santa Fe had no interest in the selection rights; (3) that through mesne irrevocable powers of attorney Santa Fe had vested in Battle Mountain the sole and exclusive right to select lieu lands and dispose of them; (4) that Battle Mountain's ownership of the selection rights here in question were duly and regularly recorded with the Bureau of Land Management in accordance with the Recordation Act of 1955. C.R. 2, 115, 116.

Meanwhile, in spite of having been paid for the base lands involved here when it sold the powers of attorney, Santa Fe requested the United States to reconvey these lands to it so that Santa Fe might determine the parties entitled thereto. The request was made on the ground that the instruments by which it had transferred its interest in that portion of the contract, i.e., the powers of attorney to select and convey the lieu lands, had been lost. Santa Fe's letter of July 19, 1956, stated:

> "Since to the best of our knowledge and belief, no exchange was ever completed for the

above described lands, and since the powers of attorney to select and convey have been lost, the Santa Fe Pacific Railroad Company respectfully requests that a quitclaim deed covering the above described lands be issued to it by the United States of America as provided by the Act of April 28, 1930. (46 Stat. 257), so that title can be cleared and confirmed to the parties entitled thereto." C.R. 80.

Without waiting for expiration of the time fixed by the Recordation Act for unknown owners of selection rights to appear, the Department quitclaimed to Santa Fe in 1956 the base land which had been the consideration for the selection rights owned by Battle Mountain. C.R. 80. When Battle Mountain applied to select lands in Oregon, the Department ruled that these rights had been extinguished by the 1956 conveyance of the base land to Santa Fe. C.R.80, Appendix C, p. A32; C.R. 63, Appendix D, p A35.

Battle Mountain Company sought judicial review of this administrative action, contending that the conveyance of the base land to Santa Fe was not authorized by the 1930 Statute under which it purported to be made 9/ and was not effective to extinguish the obligation of the United States to honor the selection right owned by Battle Mountain. The Secretary argued that the selection right was not assignable, but was merely an exchange right personal to the landowner who relinquished land to the United States under the Act of June 4, 1897. The United States District Court for Oregon held

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9/ Act of April 28, 1930, (46 Stat. 257), Appendix E, p. A38.

that the lieu selection rights in question were assignable and that Battle Mountain Company was the real party in interest. It ordered the Secretary to treat plaintiff's lieu selection rights as valid. The District Court's opinion reprinted Appendix B, pp. A15-A28.

Defendant appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court and affirmed defendant's ruling that such rights are not assignable and as to Battle Mountain had been extinguished by the reconveyance of the base land to Santa Fe in 1956. The Ninth Circuit's opinion is reprinted Appendix A, pp. A1-A13.

Battle Mountain invoked jurisdiction of the United States District Court for Oregon under the substantive and procedural provisions of the due process clause of the Fifth Amendment to the Constitution of the United States and the following Acts of Congress: The Act of October 5, 1962, (76 Stat. 744, 28 U.S.C. Secs. 1361, 1391); the Act of June 25, 1948, Ch. 646, (62 Stat. 930, 28 U.S.C. Sec. 1331, as amended); the Act of June 25, 1948, as amended, (62 Stat. 964, 28 U.S.C. Secs. 2201, 2202); the Administrative Procedure Act of June 11, 1946, (60 Stat. 243, 5 U.S.C. Sec. 1009), and the inherent power of the Court to grant injunctive relief in the premises.

## ARGUMENT

The decision of the Court of Appeals disturbs the foundations of titles to land and rights to land based on scrip and lieu selection rights where the statute does not specifically confer, nor prohibit, the right of assignment. Indeed, if the decision is upheld as a precedent, and selec-

tion rights are not transferable, then this departure in one fell swoop invalidates unsatisfied lieu selection rights owned by assignees, and puts in doubt their titles to land, and rights to land, acquired through transfers of those rights. The decision upholds the discretionary authority claimed by the Secretary of the Interior to terminate those constitutionally protected rights.

1. Santa Fe's selection rights, which it sold to Battle Mountain, are based upon a contract with the United States of America, which is constitutionally protected by the Fifth Amendment.

This Court has held in the Northern Pacific Railway Company Forest Reserve case that the right to select lieu lands is a substantial right and within the protection of the Due Process clause of the Constitution; and in reversing the Ninth Circuit, held in United States v. Northern Pacific Ry. Co., 256 U.S. 51 (1921) at P. 64 that "the proposal was converted into a contract, as to which the company by performing its part became entitled to performance by the Government. Burke v. Southern Pacific R. R. Co., 234 U.S. 669, 679,680 . . . and it is apparent from the granting act and resolution that "it was the purpose of Congress in making the grant to confer a substantial right to land within the indemnity limits in lieu of lands lost within the place limits. Weyerhauser v. Hoyt, 219 U.S. 380, 387. Such rights are within the protection of the due process clause of the Constitution. Sinking Fund Cases, 99 U.S. 700, 718", and in United States v. Northern Pacific Ry. Co., 295 U.S. 317, (1940) at P. 346 that under the ruling in the Forest Reserve case it was the obligation of the Government to refrain from any action which would deprive the

company of its right of selection in accordance with the terms of the grant."

In Lynch v. United States, 292 U.S. 571, (1934), it was held at P 579 that "The Fifth Amendment commands that property be not taken without just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. United States v. Central Pacific R.R. Co., 118 U.S. 235, 238; United States v. Northern Pacific Ry. Co., 256 U.S. 51, 64, 67. When the United States enters into contract relations its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

2. The 1918 decision, C.R. 79, by the Secretary's predecessor in office, determined that the base lands were valid for a new selection right. The 1963 opinion of the Secretary, Appendix C, p. A-28, is an attempt to deprive Battle Mountain of its rights without "Due Process" of law. Mr. Justice Grier in United States v. Stone, 2 Wall 525, at page 535; said "One officer of the Land Office is not competent to cancel or annul the acts of his predecessor . . ." And in Noble v. Union River Logging R.R., 147 U.S. 165, at page 176, it was said; "A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without "Due Process" of law, and was, therefore void."

3. The Secretary's reliance upon Section 7 of the Taylor Grazing Act for discretionary power to terminate selection rights is misplaced. Power to classify lands suitable for satisfaction of

scrip obligations of the United States is authorized, but Section 1 of the Act provides; "Nothing in this chapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore, or may be hereafter, initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law..." 43 U.S.C. 315.

The only precedent pointed to by the Secretary for his assertion of discretionary authority to terminate Battle Mountain's selection rights is his own similar action in the case of Richard M. Lade, A-29121, which is presently under judicial review by the United States District Court for Oregon and is expected to be reversed.

4. The Director's 1956 deed to Santa Fe is void and being void did not convey the base lands to Santa Fe. Title remained in the United States. The Director exceeded his authority in each of the following particulars. He had no authority under the Act of April 28, 1930, Sec. 6, (46 Stat. 257): (a) to rescind the contract entered into between the Secretary and Santa Fe, approved and ratified by the 1905 Act; (b) to convey the land, C.R. 80, Appendix D, p. A34, to which the United States had both legal and equitable title; which it had accepted as consideration for the obligation of the United States to honor the selection right, which Santa Fe's letter warned the Director it had sold to a third party long previously; (d) to make conveyance on the non-statutory ground that the powers of attorney to select and to convey had been lost, C.R. 80, Appendix D, p. A34; (e) to make conveyance without first determining the party or parties entitled thereto; (f) to make such determination without Due Process, i.e., notice and hearing, C.R. 65, 66, Appendix C,pA31;

(g) to delegate to Santa Fe the power and the duty to determine the party or parties entitled thereto; (h) to extinguish a contractual obligation constitutionally protected.

In Burfenning v. Chicago St. Paul R.R. Co., 163 U.S. 321, it was held that a wholly unauthorized conveyance made in defiance of statute although culminating in a patent, transfers no title. At P. 323, "In other words, the action of the Land Department cannot override the express will of Congress or convey away public lands in disregard or defiance thereof. Smelting Co. v. Kemp, 104 U.S. 636, 646; Wright v. Roseberry, 121 U.S. 488, 517; Doylar v. Carr, 125 U.S. 618; See 139 U.S. 507, 529; 142 U.S. 161."

The Secretary did not hold that his 1956 deed to Santa Fe was valid. He did not pass on the validity of the deed. He maintained that if the deed to Santa Fe was made by mistake, the mistake was immaterial. C.R. 65, 66. He claimed discretionary power to terminate Battle Mountain's selection rights. But the Department's mistake is not binding on Battle Mountain, for that would violate the "rule well estalished in the land office that parties' rights are never prejudiced by errors of the land office". Frank F. McCain, 34 L.D. 126 (1905).

In Battle Mountain, legal and equitable title to the base land vested in the United States. Clearly an official representing the Government decided that the base was valid for a new selection right, C.R. 79, Appendix D, p A34. Thus our case here is distinguishable from Cosmos, relied upon by the Secretary, for in that case no officer representing the Government accepted the deed tendered in a proposed exchange of lands under the

1897 Act. Cosmos Co. v. Gray Eagle Co., 190 U.S. 301, 311.

The fact that the Government had acquired legal and equitable title to the base lands conveyed to it by Santa Fe under the contract with the Government is the reason why the Department recognized that these base lands constituted a class distinct and separate from base lands surrendered under the 1897 Act. Santa Fe Pacific R.R. Co. et al., 40 L.D. 360. The Government's ownership of the base lands, which had been accepted as the consideration, explains why a right to select lands in lieu of Santa Fe contract base lands would continue to be valid until it was satisfied, even though an attempt to exercise it should fail for the fault of the selector. Ibid. By contrast, a mere exchange right under the 1897 Act would cease to exist if a relinquisher's application for lieu selection failed through his own fault. W. W. Moses Land Scrip and Realty Company, 34 L.D. 458 (1906); George L. Ramsey by Ted E. Collins, 58 I.D. 272, at 288 (1942).

5. Battle Mountain's rights were not exchange rights, but perfected lieu selection rights, freely assignable, for they were the obligation of the United States to pay for lands to which it had acquired ownership.

The Secretary equates exchange rights under the 1897 Act, (30 Stat. 36), Appendix E, p. A35, with perfected Santa Fe selection rights. But the rights are not the same. An exchange under the 1897 Act was initiated by tender of the base land simultaneously with a selection of the lieu land. The land selection had to be made with the

tender and could not be held open as a floating right to be exercised in the future. But in Battle Mountain, the selector was granted, based on contract with the Government, a new selection right to select land in the future, C.R. 79, Appendix D, p. A34--a floating right until it was exercised. The former is an exchange right personal to the relinquisher to propose to exchange land, which does not ripen into an obligation of the United States until the moment approval of the lieu selection extinguishes it. The latter is a perfected lieu selection right, an obligation to pay for land which has been acquired by the Government. The rights are the same as scrip rights, freely assignable.

Prior to the ruling in Webster v. Luther, 163 U.S. 331, in 1886, the Land Office had ruled that selection rights under R.S. 2306, were essentially personal and non-assignable. After this decision, the Department ruled that the selection rights were not only assignable but inheritable. This view was adhered to until 1917 when the non-assignability of selection rights rule was reinstated by the Department, 46 L.D. 32, on the ground that the selection rights before acceptance were not property at all but mere unaccepted offers. Mr. Justice Sutherland, speaking for the Court, said in Anderson v. Clune, 296 U.S. 140, 143 (1925), that this ruling was made plainly in the face of Webster and rejected the administrative practice. Both Webster and Battle Mountain involve equally perfected rights to select in the future lands in the public domain.

No act of Congress prohibited Santa Fe from transferring its selection rights. The presumption is that Congress intended to make the selec-

tion rights as valuable as possible. To prohibit their sale would have rendered them nearly, if not quite, valueless. The general rule of law discourages restraints upon alienation. It was for reasons mentioned that the Court held in Webster that the selection rights were assignable.

Speaking for the Circuit Court, D. Colorado, Brewer J., later Mr. Justice Brewer, in Mullen v. Wine, 26 Fed. 206 (1886) said concerning the right to select land from the public domain that, "It was a mere right of selection and taking. Like all property, it was the subject of sale. The right to sell property need not in terms be granted; it exists if it is not in terms withheld."

In Barnes v. Poirier, 64 Fed. 14, 15, 19 (1894) the Court of Appeals for the Eighth Circuit said about selection rights and restraints on their transferability, at P. 15, "Restraints upon alienation are not favored by the law. The modern rule is that one may do what he will with his own, unless prohibited by positive statute, or restrained by a manifest public policy." And at P. 19, "In these Western states, land may almost be said to be an article of merchandise. It is bought and sold far more frequently than in the older states, and many tracts of these lands have been conveyed many times, and valuable improvements have been made upon them by the purchasers whose titles rest upon such assignments and powers. These early decisions have been repeatedly affirmed. Montgomery v. Land Bureau, 94 Cal. 284, 29 Pac. 640; Webster v. Luther, 50 Minn. 77, 54 N.W. 271; Montague v. McCarroll (Utah) 36 Pac. 50. This course of judicial decision ought not to be reversed. The title to the lands conveyed on the faith of it ought not to be disturbed..."

6. The rule affording great deference to administrative interpretation of statutes which the agency administers is not properly invoked unless the interpretation relied upon actually embraces the precise issue under consideration. Kings & Kern River Projects, M-36634, 61 I.D. (Dec. 26, 1961). Since the precise issue under consideration here is the validity of the Government's obligation to pay for lands it acquired, the Court of Appeals erred by applying here departmental construction of the Act of 1897, which relates only to cases10/ where the Government did not acquire any lands and had no obligation to pay for anything.

In the District Court, the Secretary moved to dismiss the complaints and for summary judgments in Battle Mountain, Linn Land and Schmand, 255 F. Supp 382, Appendix B, p. A14, heard together, on the grounds that the attorneys in fact were not the real parties in interest. The District Court

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10/ In all of the cases relied on by the Secretary and followed by the Court of Appeals for the proposition that the Government would refuse to recognize assignments and assignees of 1897 Act in lieu selection rights, the right discussed was merely an exchange right personal to the relinquisher. It was not an obligation of the United States, which had not accepted title to the base lands. George L. Ramsey by Ted E. Collins, 58 I.D. 272, 294-295 (1942); F. A. Hyde et al., 28 L. D. 284 (1899); John K. McCornack, 32 L.D. 578 (1904); Albert L. Bishop, et al., 33 L.D. 139 (1904); Hammond Lumber Co., 46 L.D. 479 (1918); Heirs of George Liebes, 33 L.D. 458 and 460 (1905); California Door Co., 52 L.D. 644 (1929).

held against the Secretary on this issue. It is significant that the Secretary followed the administrative practice, accepted the powers of attorney as assignments, and redeemed the obligations owned by Linn Land, Appendix H, pp A88-A90, and the obligations owned by Schmand, assigned through powers of attorney to Equity Funding, Appendix H, pp. A90-A92, making the payments directly to the attorneys in fact.

To show administrative practice where assignments of forest lieu selection rights have been recognized, we have placed in Appendix G, pp A59-A82, all of the forest lieu selection rights in unreported cases11/ recorded under the Recordation Act of 1955. This shows active cases where the rights have been transferred and the assignments recorded. By analogy, the lieu selection rights earned by the Northern Pacific Railway Company are the same as the rights earned by Santa Fe. These rights under the Act of July 1, 1898, (30 Stat. 597, 620) (Forest Reserve Cases) are listed in Appendix H, pp A83-A93. They show

11/ Although Departmental decisions may not be included in the volumes published as Decisions of the Department of the Interior, they may be cited as precedents in proceedings under the Administrative Procedure Act since they are available for public inspection pursuant to published Departmental regulations, which is in accordance with Section 3 of that Act. United States v. E. M. Johnson et al., A-30191 (Apr. 2, 1965).

similar administrative practice and unreported cases where assignments have been recognized and the rights have been paid in land or money.

7. Congressional interpretation of the transferability of selection rights it has created should be of help to the Court.

It was the intention of Congress and the Department to recognize and establish privity with the unknown transferees who then owned outstanding obligations of the United States to redeem land selection rights.

The letter of Orme Lewis, Assistant Secretary of the Interior, requesting Congress to enact the Recordation Act of 1955 pointed out: "This bill would enable the Department to ascertain all outstanding lieu selection or scrip rights, including bounty land warrants. An unknown amount of such rights and claims, which range from about a half to over a full century old, is in existence. ...Once the amounts of the various scrips and rights which remain to be satisfied are definitely determined, the Department will be able to formulate a procedure for satisfying them. It is evident that virtually all of these old rights are now held by heirs and assignees of the persons to whom they were granted." House Report 749 on H. R. 2972, 84th Cong. 1st Session.

A Senate amendment to the bill insisted that notices be published so that assignees holding these obligations of the Government would be informed of the necessity to record their ownership of the rights. Senate Report 880, 84th Cong. 1st Session.

Subsequent Congressional interpretation that selection rights are assignable is made clear by the Acts of July 6, 1960, (74 Stat. 334), Appendix E,p.A40, and of August 31, 1964, (78 Stat. 751, Appendix E, p A41. In these statutes, the United States unambiguously did commit itself to recognize assignees of forest lieu selection rights. Appendix 1, p A12.

## CONCLUSION

Petitioner respectfully submits that this honorable Court should deem this case to be of sufficient importance to make appropriate the granting of a writ of certiorari.

Unless the decision of the Court of Appeals is corrected, the petitioner's constitutionally protected property rights will be destroyed through the Secretary's unauthorized assumption of discretionary power to extinguish the contractual obligation of the United States to pay for lands which it had received. Illegal administrative action, which conveyed away without statutory authority lands belonging to the United States, will be upheld and permitted to confiscate the petitioner's property rights, in violation of petitioner's rights under the Fifth Amendment.

Respectfully submitted,

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